TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 636

THE UNITED STATES OF AMERICA, PETITIONER

vs.

FRANK DELIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 7, 1943
CERTIORARI GRANTED FEBRUARY 15, 1943

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1 In the District Court of the United States for the Eastern District of Michigan Southern Division

No. 26386

UNITED STATES OF AMERICA, PLAINTIFF

v.

FRANK DELIA, DEFENDANT

Docket entries

1942

Jan. 9. Indictment filed.
Jan. 9. Report of vote of Grand Jury, filed.
Jan. 9. Defendant arraigned, waives reading, will get attorney, pleads not guilty; remanded; Picard, J.
Jan. 17. Subpoena duces tecum to clerk of recorders court returned and filed.
Jan. 21. Appearance of defendant by Jack N. Tucker, attorney, filed.
Jan. 21. Motion to quash indictment, filed.
Jan. 21. Order denying motion to quash and dismiss indictment entered; Moinet, J.
Jan. 21. Jury trial begins; jurors impanelled and sworn.
Jan. 21. Defendant represented by Jack N. Tucker, attorney; witnesses sworn; continued to January 22, 1942; Moinet, J.
Jan. 22. Jury trial resumed; witnesses sworn; arguments of counsel; charge of court; verdict of jury; guilty as charged; sentence deferred to January 23, 1942; defendant remanded; Moinet, J.
2 Jan. 22. Plaintiff's request to charge, filed.
Jan. 22. Defendant's requests to charge, filed.
Jan. 23. Defendant sentenced to imprisonment on count 1, 5 years; count 2, to 5 years to run consecutively; Moinet, J.
Jan. 23. Commitment issued.
Jan. 26. U. S. Subpoena Robert Wood et al. and William Nesbit et al. returned and filed.
Jan. 27. Notice of appeal and grounds of appeal filed.
Jan. 31. Proof of service of notice of appeal, filed.
Feb. 4. Commitment returned and filed.
Mar. 12. Certified copy of application and order for extension of time to settle bill of exceptions and file assignment of errors to May 11, 1942; Simons, J.

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May 6. Appellant's assignments of error, filed.
May 6. Agreed statement of case on appeal, filed.
May 6. Designation of contents of record on appeal, filed.
May 6. Stipulation re comparison of record, filed.
May 11. Certified copy of order extending time to settle record on appeal: Hicks, C. J.
May 22. Agreed record on appeal filed.

In United States District Court

Assignments of error

Filed May 6, 1942

Now comes Frank Delia by Jack N. Tucker, his attorney, and says that in the proceedings herein and in the orders and judgment entered there are manifest errors, to wit:

1. The United States District Court erred in denying defendant's motions for directed verdict of not guilty made when the government closed its proofs and rested and also made when the defendant closed his proofs and before the case was submitted to the jury, for the following reasons:

a. There was no evidence that the revolver or ammunition allegedly in the possession of Frank Delia had been received by him in the course of interstate commerce or foreign commerce.

b. That the interval of time that elapsed between the shipment or transportation of the revolver or ammunition and the subsequent possession thereof by defendant was so long as to negative the commission of a crime under Title 15, Section 902, Subsection F of the Federal Code known as Federal Firearms Act.

c. There was no evidence from which the jury could find that Frank Delia knew that the revolver or ammunition allegedly in his possession had been previously shipped or transported in interstate or foreign commerce.

2. That the United States District Court erred in denying defendant's motions to quash the indictment and discharge the defendant because Title 15, Section 902, Subsection F of the Federal Code known as Federal Firearms Act, under which defendant was indicted and convicted is unconstitutional and void for the following reasons:

a. It violates Amendment Ten of the Constitution of the United States in that the Congress of the United States has legislated on a matter which is entirely within the power of the States to regulate. That said subsection is not a reasonable regulation of interstate commerce.

b. It violates Amendment Two of the Constitution of the United States in that it deprives the defendant of the right to keep and bear arms.

c. It violates Amendment Five of the Constitution of the United States in that it deprives the defendant of life, liberty and property without due process of law.

d. It violates Amendment Five of the Constitution of the United States in that it compels the defendant to be a witness against himself.

4 e. It violates Amendment Six of the Constitution of the United States in that it presumes one of the elements of the offense and deprives the defendant of the right to be confronted by witnesses against him.

JACK N. TUCKER.
Attorney for Appellant

In United States District Court

Notice of appeal

Filed January 27, 1942

Name and Address of Appellant: Frank Delia, County Jail, Detroit, Michigan.

Name and Address of Appellant's Attorney: Jack N. Tucker, 3220 Barlum Tower, Detroit, Michigan.

Offense: Violation of the Federal Firearms Act, Sec. 902 (f) Title 15 U. S. C.

Date of Judgment: January 23, 1942.

Brief description of judgment or sentence: Defendant sentenced to ten years in the Federal Penitentiary.

Name of prison where now confined (if not on bail): County Jail, Detroit, Michigan.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the Judgment above-mentioned on the grounds set forth below.

FRANK DELIA, *Appellant*

Dated: January 27, 1942.

GROUNDS OF APPEAL

(1) The District Judge erred in denying the motion to quash the indictment.

(2) The District Judge erred in refusing to grant the motion for directed verdict upon the completion of the Government's case.

(3) That Section 902 (f) Title 15 of U. S. C. of Federal Firearms Act is unconstitutional and void for the reason that:

(a) It violates Amendment V of the Constitution of the United States in that it compels the defendant to be a witness against himself.

(b) It violates Amendment V of the Constitution of the United States in that it deprives the defendant of life, liberty, and property without due process of law.

(c) It violates Amendment II of the Constitution of the United States in that it deprives the defendant of the right to keep and bear arms.

(d) It violates Amendment VI of the Constitution of the United States in that it presumes one of the elements of the offense and deprives the defendant of the right to be confronted by witnesses against him.

(e) It violates Amendment X of the Constitution of the United States in that the Congress of the United States has legislated on a matter which is entirely within the power of the State to regulate.

(f) It violates Amendment V of the Constitution of the United States in that it subjects the defendant to double jeopardy for the same offense.

(4) That the sentence of the court is excessive.

6 In United States District Court

Indictment

Violation: Sec. 902 (f) Title 15, U. S. C.
Federal Firearms Act.

United States of America

In the District Court of the United States for the Eastern District of Michigan, Southern Division

Of the November Term, A. D. 1941

Eastern District of Michigan,

Southern Division, ss:

The Grand Jurors of the United States of America, empaneled and sworn to inquire in and for the body of the Southern Division of the Eastern District of Michigan, upon their oaths present: That heretofore, to wit: on the 25th day of September A. D. 1941, at the City of Detroit, in the County of Wayne, in the Southern Division of the Eastern District of Michigan and within the juris-

diction of this Honorable Court, Frank Delia, late of the City of Detroit, State of Michigan, was a person who had been previously convicted of a crime of violence, to wit: a crime of robbery while armed, did unlawfully, wilfully, feloniously, and knowingly receive and possess a firearm, to wit: one Victor 38-caliber double action No. 19435, revolver, which firearm had theretofore been shipped and transported in interstate commerce: Contrary to the form, force, and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

COUNT II

And the Grand Jurors aforesaid, upon their like oaths, do further present: That heretofore, to wit: on the 25th day of September A. D. 1941, at the City of Detroit, in the County of Wayne, in the Southern Division of the Eastern District of Michigan and within the jurisdiction of this Honorable
7 Court, Frank Delia, late of the City of Detroit, Michigan, was a person who had been previously convicted of a crime of violence, to wit: a crime of robbery while armed, did unlawfully, wilfully, feloniously, and knowingly receive and possess two 38-caliber Peters cartridges and three R. W. S. 38-caliber cartridges, which had been theretofore shipped and transported in interstate commerce: Contrary to the form, force, and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

JOHN E. LEHR,
United States Attorney.
JOHN C. RAY,
Assistant United States Attorney,
Eastern District of Michigan.

This is a true bill.

JAMES W. JORDAN, *Foreman.*

In United States District Court

Motion to quash indictment

Filed January 21, 1942

Now comes Frank Delia, by Jack N. Tucker, his attorney, and moves to quash the indictment heretofore filed, and discharge the defendant for the following reasons:

1. That defendant is charged with the violation of Section 902, Subsection F of Title 15 United States Code of the Federal Firearms Act.

2. That Section 902, Subsection F of Title 15, United States Code of the Federal Firearms Act is unconstitutional and void for the reason that:

(a) It violates Amendment V of the Constitution of the United States in that it compels the defendant to be a witness against himself.

(b) It violates Amendment V of the Constitution of the United States in that it deprives the defendant of life, liberty and property without due process of law.

8 (c) It violates Amendment II of the Constitution of the United States in that it deprives the defendant of the right to keep and bear arms.

(d) It violates Amendment VI of the Constitution of the United States in that it presumes one of the elements of the offense and deprives the defendant of the right to be confronted by witnesses against him.

(e) It violates Amendment X of the Constitution of the United States in that the Congress of the United States has legislated on a matters which is entirely within the power of the State to regulate.

JACK N. TUCKER,
Attorney for Defendant.

Business Address: 3220 Barlum Tower, Detroit, Michigan.

In United States District Court

Agreed statement of case on appeal

Filed May 6, 1942

It is hereby agreed that the following statements set forth all of the evidence and proceedings in the District Court which are essential to a decision of the questions involved by the United States Circuit Court of Appeals.

1. The government introduced competent evidence that the defendant Frank Delia was convicted of robbery armed on October 4, 1930 in the Recorders Court for the City of Detroit in the case entitled "People of the State of Michigan v. Frank Delia," same being file No. 97181 in the said court, and was sentenced to twelve and one-half to twenty-five years in state prison.

2. That defendant did take the witness stand and testify that he had been attacked by several persons during which time the
9 revolver in question with the cartridges contained therein was dropped by one of his attackers unknown to him and that he, the defendant, had picked it up in self-defense and for his own protection and that he had not seen the gun nor possessed it prior thereto.

3. That the government introduced several witnesses who testified that the defendant did have in his possession on the 25th day of September 1941 at the City of Detroit, County of Wayne, Southern Division of the Eastern District of Michigan, one Victor thirty-eight caliber double action No. 19435 revolver containing two thirty-eight caliber Peters cartridges and three R. W. S. thirty-eight caliber cartridges and that they did not see any scuffle nor did they see the revolver dropped by anyone and picked up by Delia as he claimed.

4. That the testimony of Lieutenant James F. Payne set forth in the bill of exceptions constituted all of the testimony introduced by the government that said firearm and cartridges had been shipped, transported or received in interstate commerce.

5. That there was no testimony introduced by the government that defendant knew that the gun in question had been received, shipped, or transported in interstate commerce or that he had received, shipped, or transported said gun or ammunition in interstate commerce.

6. That prior to trial and at the close of the government's case and at the close of defendant's proofs counsel for defendant moved to quash the indictment and discharge the defendant on the grounds set forth therein and further moved for a directed verdict of not guilty on the ground that the government had not introduced sufficient evidence under which ..e could be found guilty by the jury. All motions were denied by the trial court.

JACK N. TUCKER,
Attorney for Appellant.

UNITED STATES OF AMERICA,
By JOHN C. RAY,
Assistant United States Attorney.

10 In United States District Court

**Transcript of testimony*

Opening statement

MR. RAY. Ladies and gentlemen, as the Court has already informed you, the defendant Frank Delia stands charged with pos-

session, with receiving and possessing a 38-calibre Victory double-action revolver on September 25, 1941, which revolver had previously been shipped in interstate commerce. That is the gist of the first count.

The second count charges that on the very same day, that is, September 25, 1941, Frank Delia, who was a person previously convicted of a crime of violence, namely, robbery while armed, did have in his possession, did receive and have in his possession five cartridges which had been theretofore shipped in interstate commerce.

The Government will produce a number of witnesses before you who will show that on October 4, 1930, the defendant herein, Frank Delia, was convicted in Recorder's Court of the City of Detroit on a charge of robbery while armed, and that he was sentenced to 12½ to 25 years in prison. Then we shall produce witnesses who will relate what happened on September 25th, and they will point out that at the foot of Shelby street, in the City of Detroit, on the afternoon of September 25 there was some disturbance at the D. & C. docks. That police officers arrived upon the scene, and that Frank Delia, the defendant, was there.

That Frank Delia was pointed out to the officers as possessing a revolver. That the officers gave chase to Frank Delia, together with quite a number of other persons, and that they caught up with Frank Delia in a parking lot on Wayne and West Jefferson in the City of Detroit.

That Frank Delia backed up against the wall, had a revolver in his possession, and, in fact, he used that revolver to keep the crowd away. And the testimony will show that the police
11 officer drew his own revolver and approached Frank Delia and took Delia's revolver away from him.

We will next show that this revolver and these cartridges came from outside of the State of Michigan and were shipped into the State of Michigan, were objects of interstate commerce. That is the gist of the offense charged in this case again Delia, and that is, of course, what the Government will set out to prove to you.

Thank you.

PAYNE, JAMES F., called as a witness on behalf of the Government, and having been first duly sworn by the clerk, testified as follows:

Direct examination (of Lieutenant Payne) by Mr. RAY:

Q. And what is your occupation, Mr. Payne?

A. I am chemist and fire arms expert for the Detroit Police Department.

Q. And how long have you been so employed?

A. It will be fourteen years at this particular job in April.

Q. And what is your rank with the Police Department?

A. Lieutenant.

Q. And during the course of your duties as a chemist and ammunition expert and gun expert for the Police Department—or rather withdraw that question. Will you explain to the jury just the nature of your duties?

A. All the fire arms that are picked up by the Department, that is, all revolvers, pistols, shotguns and rifles, are sent from the various stations where they are picked up to the laboratory. We fire test shots through those revolvers, pistols, or rifles and compare them with our fatal bullets that we have on file, some of them dating back ten and eleven years. Those are bullets that haven't been identified in a killing. That is a routine examination each day.

12 Q. And during the course of your duties in the past fourteen years have you had occasion to examine numerous revolvers?

A. To date I have had 20,196.

Q. And have you also had occasion to visit the various manufacturers of fire arms?

A. I have.

Q. Where fire arms are made?

A. I have.

Q. Witness, I show you Government's Exhibit No. 3 and ask you whether in your experience in the Police Department you have had occasion to examine that type of a gun [handing exhibit to witness]?

A. I have had numerous occasions to examine this particular type of weapon, or make of weapon, and this particular gun was brought to the laboratory on the 25th of September of last year. Our laboratory number is A-9649. That is 10,900—or 10,964.

Q. And you made your customary examination of that gun?

A. Yes. Test shots were fired.

Q. And do you know the make of the particular gun?

A. It was made by Harrington Richardson of Worcester, Massachusetts. This model 1900 is a Victor.

Q. You have had occasion to visit the Harrington Richardson plant in Worcester, Massachusetts?

A. Yes, in Worcester, Massachusetts. I was there for four days.

Q. Is that the only plant that the Harrington Richardson Company has?

A. That is the only one they have.

Q. Now, in your duties as an expert for the Police Department, you have also had occasion to examine various types of ammunition?

A. That is correct.

Q. And cartridges?

A. That is right.

Q. And you are familiar with various makes of cartridges?

A. I am.

13 Q. Their properties?

A. We have all makes that we can possibly get, because we use the various makes in our shootings. We have to match the ammunition used in the shooting. For that reason we have all types of ammunition procurable.

Q. That is, you also purchase ammunition yourself?

A. We do. That is right.

Q. Do you also in your examination of these cartridges have occasion to visit the manufacturers?

A. I have.

Q. And how many manufacturing plants have you had occasion to visit?

A. Winchester, Peters, and Remington.

Q. Now, I show you these two cartridges of Government's Exhibit 4 and ask you what make those cartridges are [handing exhibit to the witness]?

A. Those are Peter's cartridges. They are made by the Peters Cartridge Company at Kingsmill, Ohio. That is about thirty or thirty-five miles out of Cincinnati. They are .38 Police Positive cartridges.

Q. Had you occasion to visit that particular plant?

A. I did.

Q. Do you know whether that is the only plant that the Peters Cartridge Company had?

A. That is the only plant that they had. They were taken over here several years ago by Dupont, and now it is Remington & Peters, but these were made at Kingsmill, Ohio.

Q. Now, I show you these three cartridges, also a part of Government's Exhibit 4, and ask you whether you have seen that type of cartridge or cartridges before [handing exhibit to witness]?

A. Those are German-made cartridges. They are loaded with black or semismokeless powder.

Q. You have seen those previously?

A. Yes, we have those.

Q. On numerous occasions?

A. Yes, sir.

Q. They are not of domestic origin or manufacture?

A. No, no. They are made in Germany.

14 Q. Do you know the name of the manufacturer?

A. It is made just out of Berlin. Waldro-Greiner is the powder that is used in it, and they are made just outside of Berlin.

Q. And what caliber were these cartridges?

A. .38 Police Positive.

The Court. .38 what?

A. Police Positive.

Q. The same as these two Peters cartridges?

A. The only difference is the Peters cartridges are loaded with smokeless powder.

Q. Do you know, witness, whether there are any small fire arms manufacturers in the State of Michigan?

A. Not in the State of Michigan. The only company in the State of Michigan that made any arms at all was the Marble Game Getter that was made at Gladstone, Michigan, and that is outlawed through the new Federal law. They never made a revolver pistol. They made a single shot. It was both a shotgun and a .22.

Q. And are there any manufacturers of ammunition in the State of Michigan?

A. No, sir.

Q. So Exhibit 3 and Exhibit 4, Government's Exhibit 4 consisting of five cartridges, were manufactured outside of the State of Michigan?

A. That is correct.

Q. And in order to have reached the State of Michigan they would have to be shipped or transported in interstate commerce?

Mr. Tucker. I object to that, your Honor please. That is calling for this witness' conclusion.

The Court. Sustained.

Mr. Ray. That is all. Cross-examine.

Cross-examination by Mr. Tucker:

Q. Witness, I suppose in your experience with the Police Department you have seen thousands of cartridges similar to Exhibit 4?

A. We have.

15 Q. And you have seen many, many guns similar to Government's Exhibit 3?

A. In the last four or five years the big run of them is that type of gun.

Q. I see. And could you give us the names of some of the stores in Detroit that sell cartridges similar to Government's Exhibit 4, and guns similar to Government's Exhibit 3?

A. Which cartridge do you mean?

Q. Well, you can segregate them, if you will [handing exhibit to the witness]?

A. Those of Peters manufacture could be sold by any number of hardware stores in the City of Detroit that handle ammunition, like Lew Eppinger's, J. L. Hudson, Crowley-Milner, and any number of hardware stores, although they are not made in the state; and this German ammunition is not sold by any of the reputable dealers. It would be on the order of some of this bootleg stuff. They buy it at a cheap price and they are not reputable dealers who handle this. I couldn't name any reputable dealer that would sell this. A great part of this that comes into our state has come in from Colorado mail order houses, but is not sold any place that I know of in the State of Michigan.

Q. But they are sold in the State of Michigan and in Detroit through dealers who are not reputable?

A. Well, the big share of them are mail order houses. They are not, you know, put out in the regular manner like the average ammunition that you would go in and say, "I will take a box of Police Positive or .38 Special Colt"; at a reputable dealer you do not find any of that ammunition.

Q. Now, with reference to Government's Exhibit 3, which stores in the city sell that exhibit or a similar type?

A. Well, that type of a gun, the only way you would find that sold today would be in a second-hand condition, because that gun hasn't been made—well, I would say around 1920, it was made before 1920, and that particular model is known as model
16 1900, and it wasn't a satisfactory model as far as target shooting or police work was concerned, and it was discontinued and was not manufactured any longer.

Q. So that from your experience you say the last time this type of gun, Exhibit 3, was manufactured was around 1920?

A. Around 1920.

Q. Have you any idea as to the date when those cartridges were manufactured?

A. Well, those with the lacquer on the base around the primer, they put a lacquer around them, these Peters; they started putting that lacquer around about 1934. And these others, being of a damp primer, that is a different primer than is used in our regular ammunition. It is a foreign primer, entirely foreign, used by most foreign governments, but not used at all in the United States. I would have no way of telling, because they are loaded with black powder. Just when they were loaded I don't know.

Q. Well, could you give us any idea?

A. No.

Q. As to the time?

A. No. I say they are loaded with black powder, and that is foreign to what we load, and they are not loaded in the United States and the primers are entirely different. Therefore, I don't know. They may have been in here five years or maybe ten; I couldn't say.

Mr. TUCKER. That is all.

Re-direct examination by Mr. RAY:

Q. What do you mean by a reputable dealer, witness, in ammunition and guns?

A. Well, such as Lew Eppinger's, J. L. Hudson, Tagget Brothers, Peters Sport Shop, the Tool Shop, and Tipke, all well known dealers that advertise.

Q. That advertise and must comply with any particular requirements of the Police Department?

A. Well, when they sell guns or the like of that, they must send through the request and the gun has to be duly registered. Those particular companies or dealers we have no trouble at all with, because they comply with the law.

17

Q. During the course of your investigation of Government's Exhibit 3, had you occasion to check the registration on that?

A. I don't check that.

Q. You don't check that?

A. No, sir.

Q. But you say it is a type of a gun that would not be sold by reputable dealers?

A. No. It isn't a good gun, and the age of it, it would be sold as second-hand or along that line; but no reputable dealer would sell it because there is no demand for such a gun.

Q. By saying it is not serviceable, you mean that it was not serviceable for target purposes?

A. No. The sights on it are of little or no use, and there is no lock on the chamber. The chamber turns freely, and it is not a good gun for carrying, due to the fact that the cartridges can even roll out the sides where it is loaded, so they are not carried by any police officer.

Q. But the firing mechanism is otherwise intact?

A. Oh, it is in good working order.

Q. And it could discharge a cartridge?

A. That is right.

Q. One of those cartridges?

A. That is right.

Q. So the only source of procurement or of obtaining Exhibit 3 would be a second-hand dealer, is that right?

A. That would be the place you would buy it.

Q. And would those second-hand dealers have to comply with any police regulations?

A. Well, our dealers here do have to, but a number of guns that are found here come from the State of Ohio. They are bought down there like you would buy popcorn here.

Q. It is quite simple to obtain a revolver like that in Ohio?

A. Very easy.

18 Q. And their laws are easier than the State of Michigan?

A. You don't have to have a permit to buy or anything like you do here.

Q. Have you had occasion to trace any guns to Ohio?

A. Sir?

Q. Have you had occasion to trace any revolvers and guns to their sources in Ohio?

A. We have had a number of occasions on a number of killings. The guns were purchased in Ohio from second-hand dealers in pawn shops and the like of that.

Mr. RAY. That is all.

Re-cross examination by Mr. TUCKER:

Q. Well, around 1920, however, reputable dealers did handle this type of a gun?

A. Before the war—now, so it is understandable, prior to 1920 pistol shooting was at a very low ebb in this country, due to the fact that the guns that were made were not suitable to it. The United States Army had a .38 Colt D. A. known as the double action which was probably the first .38 gun that really was of any use. It was used in the Philippines and in through there and through that gun being accurate they started developing guns along that line. These were very common. I know in my home town they used to have one, this fellow. That is up here in the state, along that time.

Q. So along that time this type of gun, which is Government's Exhibit 3, was in common display in the State of Michigan?

A. Oh, it was, yes; that is right.

Q. There are ways of tracing guns, aren't there?

A. Well——

The COURT (interposing). Ways of what?

Q. Tracing guns?

A. (Continuing). You can, like Colt and Smith & Wesson. You send in the number and their records are very com-

19 plete. But Harrington and Richardson, who took over Hopkins & Allen and a number of those companies, you write in—I know we sent in numerous telegrams to them, and anything around 1920 or before that, their records are incomplete,

and you never get any reply from them. They don't know when the gun was made. You can't tell. They have no records.

Mr. TUCKER. That is all.

Mr. RAY. That is all, witness.

In United States District Court

Charge of the court

The COURT. Members of the jury, it now becomes the duty of the court, the proofs having been closed and arguments completed, to charge you upon the law involved in this case.

The defendant here, Frank Delia, is charged in this indictment with having on or about the 25th day of September 1941, at the city of Detroit, setting forth and charging that he was a person who had been previously convicted of a crime of violence, to wit, the crime of robbery while armed, and that he did unlawfully, wilfully, feloniously, and knowingly, receive and posses a fire arm, to wit, one Victor 38 caliber double action number 19435 revolver, which firearms had theretofore been shipped and transported in Interstate Commerce, in violation of the Act of Congress and in violation of law.

The second count charges that upon the same day at the City of Detroit the same defendant, who was a person who had been previously convicted of a crime of violence, to wit, a crime of robbery while armed, did unlawfully, wilfully, feloniously, and knowingly receive and possess two 38 caliber Peters cartridges, and 3 R. W. S. 38 caliber cartridges, which had been theretofore shipped and transported in Interstate Commerce, in violation of law.

20 Those are the charges that are contained in the indictment: and, of course, an indictment is an instrument returned by Grand Jury containing in legal language the charges upon which a defendant is placed upon trial, and those are the only charges made here. Now, these charges set forth, and the indictment is no evidence of the facts that are contained therein, they are simply charges by the government to be true, and based upon the indictment the government introduces its proofs to sustain the charges set forth in the indictment. This indictment is based upon an Act of Congress, which, among other things, provides, and I am now reading Section 902 of the Act of Congress, subdivision F:

"It shall be unlawful for any person who has been convicted of a crime of violence, or is a fugitive from justice"—that isn't

here, the latter portion. There is no claim made that he is a fugitive from justice.

"It shall be unlawful for such person who has been convicted of a crime of violence to receive any firearm or ammunition, which has been shipped or transported in interstate or foreign commerce from one state into another or from one country into the United States; and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter";

and I will allude to that particular presumption, which is set forth in this Act of Congress.

In the first place it is obvious that this Act of Congress applies to one class of persons, persons who have been convicted of a crime of violence, as involved in this case. It applies to others "or is a fugitive from justice." It applies in this case, as alleged in the indictment, that this defendant had been convicted of a crime of violence—robbery armed. Therefore it is the claim of the government that he is brought within this provision of the law; and, that law provides that is unlawful for any person
21 who has been convicted of a crime of violence to receive any firearm or ammunition which has been shipped or transported in interstate commerce or foreign commerce.

Now, that is the provision of the law which gives Congress the power to enact such a law. Why? It involves interstate commerce. The shipments of goods, or passengers, persons going from one state into the other, from a foreign country to the United States. That is interstate commerce. So that it applies here.

At the outset I will state the claims of the government, upon one side, and for the defendant, upon the other; and in stating those claims made you must understand that the burden is upon the government to prove, under the rules of law which I will give you, those claims by evidence presented here. I do not intend to emphasize any of the evidence to you, nor do I intend to state any opinion upon the evidence.

You are the sole judges of the facts. The court's province only is to charge you upon the law, and your province is to determine from the facts, based upon the law and given to you by the court, where the truth lies, and whether or not the government has established under this indictment that the defendant is guilty.

It is the claim of the government that this defendant is within this class set forth in this Act of Congress, that he is a person who was convicted of a crime of violence; and the government claims that that evidence has been presented by records, which were introduced here in evidence, of the court in which he was con-

victed of this offense—robbery armed. Robbery armed is a crime of violence. The government claims that, being within that class, that upon this day in question this defendant was in possession of this pistol or revolver, as described in the indictment, and the cartridges. Whether or not it has proven that theory is for you to determine.

The theory of the government is that upon this day in
22 question, the 25th day of September 1941, this defendant was in the city, down along the docks upon some of the streets there. I do not recall the streets; that there was some controversy there; policemen were there. The government claims that this defendant upon that occasion was in possession of this revolver, and these cartridges; that he exhibited them; held them out. The government claims that he had it in his possession.

And the government further claims that this particular revolver had been involved in interstate commerce; that it came from some other state into Michigan; and that is upon its theory, the government claims from one of the witnesses upon the stand, who was an expert in firearms and cartridges, that this revolver was never manufactured in Michigan, but that it came from outside the state, so that if that particular revolver from outside of the State of Michigan was subsequently found in the State of Michigan then it must have come into the state in interstate commerce. That does not mean we have got to say that it was shipped by express and came in in a parcel. If someone brought it in it was interstate commerce; carrying goods from one state into another. If you were to go into Ohio and make purchases, and come back into Michigan you would be involved in interstate commerce in bringing goods from one state into another. So that the theory of the government is that interstate commerce is involved here; and it must be, else the government has no case.

Congress would not have jurisdiction to enact a law unless interstate commerce was involved in this particular case. So theory of the government is that this gun or revolver was not manufactured in Michigan; therefore someone brought it into Michigan, either in shipment, or *or* otherwise, brought it in; and the theory of the government it that it was in interstate commerce from the state where it was made, and was subsequently found upon this day in question, in Detroit, Michigan, in the hands of the defendant, together with the cartridges which were contained in the revolver.

23 The government further claims that he was shown to be in the possession of it. And the Act of Congress reads:

"That it shall be unlawful for any person who has been convicted of a crime of violence to receive any firearm or ammunition which has been shipped or transported in interstate or foreign

commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped, or transported, or received, as the case may be, by such person in violation of this chapter."

So, the theory of the government is that this revolver was involved in interstate commerce; that it was brought into Michigan; that it was in possession of the defendant upon the day in question, and was loaded with five cartridges down here upon the street. The government claims upon that occasion there was some difficulty down there. We are not involved in any labor controversy here; not a bit of it. It is merely a part of the proofs here, and it is obvious to all of us about what it was; but that is not involved here. Only the charge made in the indictment is involved here.

The government claims that this defendant upon this day in question had that revolver, and exhibited it, and hit others with it, and that he was pointing it at the policeman when the policeman approached him with his revolver drawn upon this defendant and compelled him to deliver it up to the policeman. So the government claims that he was in possession of it. It claims that it has proven that it was in interstate commerce; came from another state; and he become in possession of it. The government claims that that is evidence that the firearm or ammunition was shipped, or transported, or received, as the case may be, by the defendant, in violation of the law. And that applies to both counts in the indictment. One count applies to the revolver, and the other count applies to the cartridges.

So, you see, this is a peculiar case. Congress has aimed at this class of individuals; those who have been convicted
24 of violent crimes. Unless the government could prove that the defendant had been guilty of the crime of the nature involved here, that is robbery armed, within this class, he would not come within that law. So that is the theory of the government; and it is for you to determine whether or not those claims are established under the rules of law, which I will give you.

Now, the defendant, in reply to this charge made against him, denies it by a plea of not guilty. He denies every charge alleged and set forth in this indictment. He is upon trial; and the burden is upon the government, under the rules of law which I will give you, to prove the charges made in this indictment.

He admits, at the outset, that he was convicted of a violent crime—robbery armed—and has served some time, and is on parole, as I understand it, in the Michigan State courts. He admits that. He admits that upon this day in question he was at the scene of action down upon the street along the docks along the river. He admits that upon this day in question he was in

this room up here in the Hofman Building. I think they call it, and there were others there, and that some trouble arose, and they started out. He denies that he had the possession of the revolver at that time, by his testimony. He admits that he went down there to this scene of action; that there was some controversy there; and that he and some others were there; and it is his claim that in the melee there that occurred, someone dropped a revolver on the ground, and he picked it up, and he struck a man over the head with it. He admits that. And the man claims that he hit him, and that is not charged here. It is merely evidence that appears in what we call the res gestae, the facts that are under investigation. And he claims that he had the revolver there, and the policeman appeared, and that he had the revolver out, and that the policeman approached him with his revolver, and that he gave this revolver to the policeman.

25 Now, the government, in reply to those claims, claims that it has given evidence by witnesses who were there, that they saw no revolver dropped upon the ground. The government claims that two witnesses have testified, that their testimony is that this man and another man were together; that they both had their hands in their pockets, coat pockets or trousers pockets, as if they might have a pistol in there. The government claims that these two men testified that the defendant here with a revolver struck another over the head, and wounded him, and blood flowed. And the government claims that from the testimony here that this defendant did not pick up this revolver from the ground, but that he had it all of the time.

Now, those are the facts made up of evidence and sworn to upon the stand in your presence, examined and cross-examined.

The defendant has become a witness in his own behalf, as he has the right to do, under the law. And in weighing his evidence and considering his testimony you have the right to have in mind his interest in the case, and in the result of the case. The question of interest is always an element to be considered by the jury, based upon the theory, legally, that we might be liable to shade our evidence according to our own interest. So in weighing his evidence you should have in mind that fact. However, if you are persuaded of the truth of his evidence you should believe him, notwithstanding the fact that he is the defendant in the case, interested in the case, and interested in the result.

You are the sole judges of the facts, as I have said. You are called upon to analyze these facts, this evidence, in all of its phases. The witnesses upon the stand, in weighing their evidence, do they appear to be truthful? Is their evidence contradicted by other witnesses, or the surrounding facts and circumstances, or is it corroborated, backed up, by the evidence of other witnesses, or the

surrounding facts and circumstances, or probabilities in the case? Where does the truth lie?

26 The defendant comes into this case, as in all criminal cases, presumed to be innocent of the charges that are made against him; and this presumption of innocence remains with him throughout the trial, until the government establishes his guilt beyond a reasonable doubt; not beyond all reasonable doubt, as the term is sometimes used; beyond a reasonable doubt; and a reasonable doubt in law means just what the words fairly imply in their ordinary use and expectation; a reasonable doubt; a doubt for which you can give a reason. It is not an imaginary doubt, or a capricious doubt, or a possible doubt; but it is one based upon reason and common sense. Upon final analysis it is that doubt which you have in your minds after you have carefully weighed all of the evidence that you cannot say that you are satisfied to a moral certainty of the truth of the charges made against the defendnt.

So, the first question for you to determine is this: Has the government, under the rules of law which I have given you, established the fact that he was a person, the defendant, who had been previously convicted of a crime of violence; and that he did unlawfully, wilfully, feloniously, and knowingly, receive and possess the firearm which has been described here, and the cartridges, which firearm had theretofore been shipped and transported in interstate commerce?

If you find, under the law and under the facts, that this defendant, upon this day in question, went there without a revolver, and that the revolver which he held in his hand upon this occasion and drew was picked up from the ground, and he had not prior thereto been in possession of it or had it, he would not be guilty of the crime charged here, because the theory of the government is otherwise. The theory of the government, in the first place, is that this revolver was transported in interstate commerce, and that he had it in his possession prior to the time of going down there. And if he received it from someone, whether he knew it was in interstate commerce or not, would make no difference, because the government claims to have proven here,

27 and the evidence appears to be uncontradicted, that this revolver was involved in interstate commerce; it came from one state into the State of Michigan. And it claims that by reason of the fact that this revolver was never manufactured in Michigan, but was manufactured in another state. So the government claims that this defendant being in possession of this revolver

upon this day in question, that the possession was presumptive evidence that such firearm and the ammunition was shipped, or transported, shipped by express or freight, or carried in by another, or him, in interstate commerce, either by such person or others to his knowledge, in violation of this chapter.

And I will charge you upon that. That is a presumption based upon facts. Even with that statutory presumption the government is not relieved of its duty and responsibility under the law to establish its case, under the rules of law.

I have given you as to the burden of proof on the part of the government. The defendant has gone upon the stand and denied the charges made by the government; denied that he ever transported the revolver; denied that he ever took it down there; claimed that he picked it up from the ground when someone dropped it, and having taken it up used it; he didn't fire it; no claim was made that the revolver was fired, but it was held in a threatening manner against others who were approaching, and so forth, and he ran up the street and was found by the officer.

In passing upon and weighing the evidence of the defendant and passing upon his credibility you have the right to consider the fact that he has been convicted of a crime. You would not be permitted to say that he has been convicted of that other crime, and therefore he must be guilty of this crime. That is not the rule. It only goes to his credibility as a witness; his believability. A man's record for crime as a witness upon the stand is always considered as going to his credibility, his believability, as a witness.

98 So it is your duty under the law to weigh all of the evidence in this case fairly and impartially. Examine the evidence of all of the witnesses. They were sworn in your presence. And in weighing their evidence you would observe their manner and their appearance upon the stand. The evidence which they give. Does it have the ring of truth? Is it contradictory? Is it corroborated, backed up, by their own evidence, or the evidence of other witnesses, or the surrounding facts and circumstances?

If, after a careful analysis of all of the evidence in the case, you are satisfied that the government has established its claim, under the rules of law which I have given you, it would be your duty to return a verdict of guilty as charged in the indictment, the two counts. If you are unable to find the defendant guilty under both counts of the indictment, but should find the defendant guilty under one count, then the form of your verdict would be "We find the defendant guilty" under the count, naming it. The first count applies to the revolver. The second count applies to the cartridges.

If, upon the other hand, you are unable to find that the government has established its case under the rules of law which I have given you it would be your duty to return a verdict in form "not guilty."

Any exceptions, or further requests?

Mr. TUCKER: Your Honor please, in my requests to charge I had asked your Honor to charge the jury the definition of presumption, and that appears upon page 2 and 3 of the request to charge.

The COURT. The presumption set forth in the statute with reference to the defendant that the firearm or the ammunition was shipped, or transported, or received, in interstate commerce is a statutory presumption. It has little weight here because of the fact that the defendant has taken the stand in his own behalf, and he denies the charges made in the indictment. He denies that he was knowingly in possession of the revolver in question, as charged in the indictment, and that his defense is that he
29 never knew or had any knowledge that this revolver was transported in interstate commerce. I have charged you that even though this presumption against the defendant is in the statute it still remains the burden of the government to establish his guilt under the rules of law which I have given you.

Swear an officer.

In United States District Court

Verdict

Filed January 22, 1942

The defendant Frank Delia being present in Court, and the jury heretofore empaneled being again in Court, and having heard the proofs and testimony of witnesses, the arguments of counsel and the charge of the Court, retire from the Bar thereof, under the charge of officers duly sworn for the purpose, to consider their verdict; and after being absent for a time, come into Court again and in the presence of the defendant say upon their oaths that they find the said defendant Frank Delia guilty as charged in the indictment heretofore filed against him.

Thereupon the Court does now here order the sentence of said defendant deferred to January 23, 1942 and said defendant remanded into the custody of the United States Marshal.

EDWARD J. MOINET,
District Judge.

30 In United States District Court

Sentence

Filed January 23, 1942

The defendant, Frank Delia, being present in Court, and being represented by Jack N. Tucker, his attorney, and having, on January 22, 1942, been found, by a Jury, guilty as charged in said indictment, and now being before the Bar of the Court for sentence, and inquired of by the Court if he had anything to say why sentence should not be imposed, and the Court having fully considered all that said defendant had to say in his behalf, thereupon the Court does now sentence said defendant, Frank Delia to be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment as follows:

Under Count one (1), imprisonment in a Penitentiary for and during the term and period of five (5) years.

Under Count two (2), imprisonment in a Penitentiary for and during the term and period of five (5) years, said terms of imprisonment to run consecutively, beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a Jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such Jail or other place of detention.

EDWARD J. MOINET,
U. S. District Judge.

Approved as to form:

JOHN C. LEHR,
U. S. Attorney.
By JOHN C. RAY,
Asst. U. S. Attorney.

31 In United States District Court

Certificate and order settling record on appeal

Filed May 22, 1942

I hereby certify that the foregoing Agreed Statement of Case on Appeal together with the pleadings and testimony designated by the attorneys for the plaintiff and the defendant is correct and fully presents the questions raised by the appeal and the same is hereby approved, settled and allowed as the Record on Appeal.

It is further certified that said record is settled within the time allowed therefor as extended by the Circuit Court of Appeals.

EDWARD J. MOINET,
United States District Judge.

Dated: May 22, 1942.

In United States District Court

Stipulation re comparison of record

Filed May 6, 1942

It is hereby stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit without comparison.

JACK N. TUCKER,
Attorney for Appellant.
JOHN C. RAY,
Attorney for Appellee.

Dated at Detroit, Michigan, this 6th day of May 1942.

32 In United States District Court

Designation as to contents of record on appeal

Filed May 6, 1942

Appellant and appellee by their attorneys hereby designate the following portions of the record, proceedings, and evidence to be contained in the record on appeal in the above-entitled cause:

1. Calendar entries.
2. Indictment of the grand jury.
3. Motion to quash indictment.
4. Verdict of the jury.
5. Sentence of the court.
6. Notice and grounds of appeal.
7. Agreed statement of the case on appeal together with:
   a. Opening statement of United States attorney.
   b. Testimony of Lieutenant Payne.
   c. Charge of the court to the jury.
8. Certificate and Order Settling Record on Appeal.
9. Appellant's assignments of error.

10. Stipulation as to comparison of record.
11. Certification of record by clerk.

JACK N. TUCKER,
Attorney for Appellant.
UNITED STATES OF AMERICA,
By JOHN C. RAY.
Assistant United States Attorney.

33 In United States District Court

Order extending time to settle record on appeal

(Filed May 8, 1942)

Before HICKS and ALLEN, JJ.

Appellant and appellee having filed Application for Order Extending Time to Settle Record on Appeal in the above entitled cause and the Court being duly advised in the premises, now, therefore,

It is ordered that the time for settling record on appeal be and the same is hereby extended to May 25, 1942.

XEN HICKS, *Circuit Judge.*

[Clerk's certificate to foregoing transcript omitted in printing.]

34 IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cause argued and submitted

(October 19, 1942)

Before HICKS, ALLEN, and HAMILTON, JJ.

This cause is argued by Morton A. Eden for Appellant and by John Ray for Appellee and is submitted to the court.

35 In United States Circuit Court of Appeals

Judgment

(Entered December 2, 1942)

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded for proceedings not inconsistent with the opinion of this court.

36 In United States Circuit Court of Appeals,
Sixth Circuit

Nos. 9157 and 9179

No. 9157

WILLIAM MINSKI, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 9179

FRANK DELIA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeals from the District Court of the United States for the Eastern District of Michigan, Southern Division

Opinion

Filed Dec. 2, 1942

Before HICKS, ALLEN, and HAMILTON, Circuit Judges

HICKS, Circuit Judge. These cognate cases are disposed of by one opinion.

Appellant Minski was convicted upon the first and second counts of an indictment which alleged violations of subsection (f) of Sec. 2 of the Federal Firearms Act [52 Stat., ch. 850, p. 1250 et seq., 15 U. S. C., subsections 902 (f) and (i)] and upon a third count which alleged a violation of subsection (i) of Sec. 2 of the same Act.

Appellant Delia was convicted upon both counts of an indictment which alleged violations of subsection (f) of the statute. Subsection (f) is as follows:

"(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, *and the possession of a*
37 *firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped*

or transported or received, as the case may be, by such person in violation of this Act." [Italics ours.]

Subsection (i) is as follows:

"(i) It shall be unlawful for any person to transport, ship, or knowingly receive in interstate or foreign commerce any firearm from which the manufacturer's serial number has been removed, obliterated, or altered, *and the possession of any such firearm shall be presumptive evidence that such firearm was transported, shipped, or received as the case may be, by the possessor in violation of this Act.*" [Italics ours.]

The facts are, that Minski was on November 10, 1921, convicted in the Recorder's Court of Detroit of robbery while armed, and a sentence of 10 to 20 years was imposed. There was substantial evidence that on September 22, 1941, Minski, while driving along the streets of Hamtramck, Mich., was stopped by police officers, who found on the floor of his car a .45 caliber Colt, frontier model, single action, revolver, from which the manufacturer's serial number had been obliterated. The revolver was loaded with five Remington .45 caliber ball cartridges. There was stamped thereon the name and address of the maker and the place of manufacture, to wit, Hartford, Conn. The cartridges were manufactured by Remington Cartridge Company of Bridgeport, Conn. There was evidence that the revolver was 40 or 50 years old.

In Delia's case the facts are, that on October 4, 1930, he was convicted in the Recorder's Court of Detroit of robbery while armed, and was given an indeterminate sentence of from 12½ to 25 years. There was substantial evidence that on September 25, 1941, he was found in Detroit in possession of a Victor .38 caliber, double action, No. 19435 revolver, containing two .38 caliber Peters cartridges and three R. W. S. .38 caliber cartridges. This revolver was made about 1920 by Harrington Richardson in Worcester, Mass. Some of the cartridges were made in Ohio and the others in Germany.

The caption of this Act is: "To regulate commerce in firearms."

Subsection (f) applies to two classes of persons, to wit:
38 (1) those who have been convicted of a crime of violence; and (2) those who are fugitives from justice, but not to either unless they have received a firearm or ammunition which has been shipped or transported in interstate or foreign commerce. Section (i) applies to all who transport, ship, or knowingly receive in interstate or foreign commerce any firearm from which the manufacturer's serial number has been obliterated or altered.

Ordinarily it would not be difficult for the Government to prove that a defendant found with forbidden firearms or ammunition was a convict of the class mentioned, or a fugitive from justice, but to establish that the forbidden articles had been shipped,

transported, or received in interstate commerce, would raise for it an almost insuperable burden unless the law should bring to its aid some character of presumptive evidence. This is true because the circumstances under which the defendant has acquired possession of the forbidden articles are in most cases peculiarly within his knowledge. For this reason the Congress undertook to bring to the aid of the Government, in its task of enforcing the statute, the "presumptive evidence" clauses which we have italicized.

The principal question here is, whether the presumptions provided by subsections (f) and (i) were violative of the due process clause of the Fifth Amendment.

Statutory presumptions, whereby the proof of one fact or group of facts, shall constitute prima facie or presumptive evidence of the main or ultimate fact are not, per se, illegal. Such statutes have been upheld even in criminal cases. Yee Hem v. United States, 268 U. S. 178; Copperthwaite et al. v. United States, 37 Fed. (2d) 846, 848 (C. C. A. 6).

In Mobile, J. & K. C. R. R. Co. v. Turnipseed, Admr., 219 U. S. 35, 42, the court upheld legislation which provided, as a rule of evidence, that the proof of one fact shall constitute prima facie evidence of the main fact in issue, but it pointed out a well-recognized qualification to the rule that it is "essential that there shall be some rational connection between the fact proved and the ultimate fact presumed and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

In McFarland v. American Sugar Co., 241 U. S. 79, the court reviewed a statute of Louisiana, which created the rebuttable presumption that any person systematically paying in that state a lower price for sugar than he paid in any other state is a
39 party to a monopoly or conspiracy in restraint of trade. Quoting, as we have done from the Turnipseed case, the court said further:

"As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. * * * The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. *But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.*" [Italics ours.]

In Manley v. Georgia, 279 U. S. 1, the court had before it a Georgia banking Act which declared that "every insolvency of a bank shall be deemed fraudulent and the president and directors shall be severally punished by imprisonment and labor in the penitentiary * * * provided that the defendant * * * may repel the presumption of fraud by showing that the affairs

of the bank have been fairly and legally administered, * * *"

The court said:

"State legislation declaring that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid *if there is a rational connection between what is proved and what is to be inferred.* * * * A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it, violates the due process clause of the Fourteenth Amendment. Bailey v. Ala., 219 U. S. 219, 235, et seq. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property." [Italics ours.]

In Western & Atl. R. R. Co. v. Henderson, 279 U. S. 639, a Georgia statute provided that upon the mere fact of a collision between a railway train and a vehicle at a highway grade crossing and resulting death, a presumption arose that the company and its employees were negligent in the particulars alleged in the complaint, etc. The court held that the presumption was unreasonable and arbitrary and violated the due process clause of the Fourteenth Amendment. It said:

"A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

In Morrison v. California, 291 U. S. 82, it is said, at page 90:

"What is proven must be so related to what is inferred in a case of true presumption as to be at least a warning signal according to the teachings of experience."

So, also, in Adams v. New York, 192 U. S. 585, 593, it is said:

"The legislature may enact that when certain facts have been proved they shall be prima facie evidence of the existence of the main fact in question, *provided the inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary or wholly unreasonable, unnatural or extraordinary.*" [Italics ours.]

To substantially the same effect see Bailey v. Alabama, 219 U. S. 219, 238.

In Insurance Co. v. Weide, 78 U. S. 438, 441, the court said:

"A presumption is an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known. . . ."

In the Yee Hem case, supra, and the Copperthwaite case, supra, the requisite element of reasonableness in statutory presumptions was adverted to. See also Luria v. United States, 231 U. S. 9,

25. There must be some logical connection or relationship based upon common knowledge, reason and experience between the proven fact or facts and the inferred or presumptive fact. If such connection does not exist, it follows, obviously, that a defendant is exposed to conviction upon evidence which has no probative value; or, put in another way, upon no evidence at all. It follows, further, that if at the close of the Government's proof the accused seeks to defend himself, the burden is cast upon him of explaining a situation which up to that point had no incriminating tendency or effect.

41 With reference to subsection (f), we find no basis for the proposition that if an ex convict is found with a firearm or ammunition an inference or presumption follows that he received, shipped or transported those articles in interstate commerce. Such presumption does not exist in fact and cannot be brought into existence by legislative fiat.

Presumptions are founded on the ordinary course of things; and common knowledge or experience does not teach that the class of persons with which we are here dealing usually procures firearms through the channels of interstate commerce. It is as likely that the firearms and ammunition found upon appellants were acquired within the State of Michigan in an intrastate transaction. We are here forced to deal in guess work and one guess is as good as another. Suppose appellants had been apprehended in one of the New England states, where such weapons appear to be manufactured, would the presumption logically arise that they had acquired them or brought them from without the state?

Then again, the Minski revolver was 40 or 50 years old, and the Delia revolver about 20 years old. Is there any reasonable presumption that these weapons were acquired by appellants in violation of this Act after June 30, 1938, the date of its passage?

Equally, under subsection (i), we think it is a non sequitur that the possessor of a firearm from which the manufacturer's serial number has been obliterated must presumptively have transported, shipped, or received it in interstate commerce. The very age of the weapons here involved demonstrates the unfairness of drawing any inferences from the obliterated markings as to the manner of their acquisition or possession.

The guaranty of the due process clause of the Fifth Amendment is, that a law shall not be unreasonable, arbitrary or capricious, and we think that the presumptive evidence clauses of the Act here involved must fall before the Constitutional inhibition. We are aware that some district courts have found otherwise but we are not in accord with such holdings.

The judgments appealed from are reversed and the cases remanded to the District Court for proceedings not inconsistent herewith.

42 [Clerk's certificate to foregoing transcript omitted in printing.]

43 Supreme Court of the United States

No. 636. October Term, 1942

Order allowing certiorari

Filed February 15, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, and the case is assigned for argument immediately following No. 569.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 47137. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 636. The United States of America, Petitioner vs. Frank Delia. Petition for a writ of certiorari and exhibit thereto. Filed January 7, 1943. Term No. 636 O. T. 1942.

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